

Masthead Logo

Nova Southeastern University
NSUWorks

Fischler College of Education: Student Articles

Abraham S. Fischler College of Education

4-10-2016

Distributive Justice Research Paper and Critical Analysis of the Disenfranchisement of Ex-Offenders and their Employment Opportunities

Richard Louis

Follow this and additional works at: https://nsuworks.nova.edu/fse_stuarticles

Part of the [Education Commons](#)

Assignment 2 Topic 4 Distributive Justice
Research Paper and Critical Analysis of the Disenfranchisement of Ex-Offenders and
their Employment Opportunities

by
Richard Louis
EDD 8442 CRN 30280
Ethics and Social Responsibility

Nova Southeastern University
April 10, 2016

The Disenfranchisement of Ex-Offenders and their Employment Opportunities

Ex-Offenders and Background Checks

On most job applications, there are any one or more questions that could trigger further inquiry into an applicant's background "Have you ever been convicted of a felony?"; "Have you ever been arrested?"; "Have you ever pled no contest to any criminal or civil offense?". A great majority of U.S. citizens are profoundly affected by these questions as one in four U.S. citizens currently have a criminal record (D'Alessio, Flexon, & Stolzenberg, 2014). D'Alessio, Flexon, and Stolzenberg (2014) indicated in their research that 92% of employers conduct background checks on prospective employees which based on the amount of U.S. citizens with a criminal record, would generate a hit of up to 25% of the entire U.S. population.

Lahr and Schloss (2008) state that pre-employment screening is a necessary hiring practice for any size business to insure an organization receives an optimal employee, keep the workplace safe, and protect itself from possible negligent hiring lawsuits. Bohlander, Norris, and Snell (2016) defined negligent hiring as an organization's failure to discover via due diligence that an employee they have hired had a propensity to inflict harm onto others. Lahr and Schloss (2008) continued to emphasize in their research that although there isn't any guarantees about anyone, all organizations are bound by the law and the greater welfare of the work environment to decrease the risks of danger in the workplace.

Every year, millions of individuals are released from jails and prisons in the United States with the goal of reintegrating into mainstream society (Martin, 2011). The obstacles that ex-offenders face are numerous and one of the central components to success after release is the ability to secure sustainable employment (Martin, 2011). Lucken and Lucille (2008) identified ex-offender employment as a core concern of ex-offender reentry efforts. In 2003, the

unemployment rate of ex-offenders was at a staggering 25 to 40 percent which was due in part to lack of employment readiness however, in large part due to regulatory statutes which has placed barriers on the ability for ex-offenders to secure employment (Lucken & Lucille, 2008).

Lucken and Lucille (2008) further emphasizes that ex-offenders not being able to find employment places a huge burden on society at large as it could result in potential increases in crime, rising criminal justice costs, uncompensated health care expenses, and the destruction of families and communities. The annual gross domestic product net loss due to the removal of ex-offenders from the workforce through incarceration and employment restrictions would be \$100 to \$200 billion (Lucken & Lucille, 2008).

Disenfranchisement of Ex-Offenders

The ability to obtain sustainable employment is certainly compromised through an individual having a felony conviction. The society at large is not only affected by having one less taxpayer, this also effectively disenfranchises the ex-offender by shutting them out from the opportunities to reconstruct their lives. Schmitt and Warner (2011) indicated in their study, that a felony conviction or time in prison will certainly cause an individual to be much less employable in their lifetime. In 2008, the United States economy lost the equivalent of 1.5 to 1.7 million workers from the workforce due to employability challenges resulting from an adverse criminal justice history (Schmitt & Warner, 2011).

The disenfranchisement of ex-offenders is projected to have a lasting impact based on recent statistical data, unless there are serious changes in the statutory treatment of ex-offenders. Between the years 2000 and 2010, the imprisonment rate of offenders to free citizens was 478 to 500 incarcerated offenders per 100,000 residents (Hickox & Roehling, 2013). In 2010, over 700,000 individuals were released from state and federal prisons (Hickox & Roehling, 2013).

The amount of ex-offenders being released annually does indeed lower the prison population; however it increases the ongoing needs of a population seeking to reintegrate themselves into mainstream society while overcoming the challenges associated with the scarlet letter of a felony conviction. Hickox and Roehling (2013) examined that the impact of disenfranchisement has an even bigger disparate impact on men of color; at the end of 2010, on the federal and state level (including probationers and parolees) there were over 1.3 million men under some sort of criminal justice control; with the majority of those individuals being men of color. Disparate impact refers to the rejection of employment at a significantly higher percentage for members of a protected class as compared to those members of a non-protected class (Bohlander, Morris, & Snell, 2016). As per Title VII of the Civil Rights of 1964, men of color would be considered a protected class since the act includes individuals of a minority race as a protected class (Bohlander, Morris, & Snell, 2016). Hickox and Roehling (2013) reported that of the aforementioned 1.3 million men; approximately 450,000 were white males, 562,000 were black males, and about 325,000 were Hispanic males. These disproportionate numbers translates into there are 3,074 black males incarcerated per 100,000 residents as compared to 1,258 Hispanic males per 100,000 and 459 white males per 100,000 (Hickox & Roehling, 2013). Hickox and Roehling (2013) concluded that these numbers meant that a black male is fifteen times more likely to be under correctional control as compared to a white male. The aforementioned numbers demonstrated that not only would a minority male have a greater statistical chance to become an ex-offender, the minority ex-offender would face greater challenges as well as disparate treatment as it pertains to seeking employment.

The disenfranchisement of ex-offenders is ever present as the ability to transition into mainstream society is hindered by obstacles intentionally designed to perpetuate punishment even after a period of incarceration. Cerda, Curtis, and Stenstrom (2014) indicated that employability for ex-offenders is pivotal to their reentry into the community and to reduce the chances of recidivism. When surveying employers, the factors in which are taken into account when hiring ex-offenders are the type of offense and the skills of the applicant (Cerda, Curtis, & Stenstrom, 2014). Employers tend to have an aversion to hiring violent ex-offenders as ninety percent of employers were unwilling to hire violent ex-offenders; however employers were more willing to hire ex-offenders of drug crimes or even crimes against property (Cerda, Curtis, & Stenstrom, 2014). The employability of an ex-offender can be tenuous upon release as many ex-offenders lack education and vocational training being released from prison as they also lacked these skills upon entry into prison (Cerda, Curtis, & Stenstrom, 2014). Cerda, Curtis, and Stenstrom (2014) defined basic employability skills that are sought by employers as basic skills such as reading and writing, personal qualities such as respect for others and being on time for work, thinking skills such as the ability to reason and problem solve, and the mastery of soft skills.

The connection between disenfranchisement and recidivism is clear as ex-offenders who are unable to secure employment and sustain a law abiding lifestyle as defined by our society have an increased likelihood in returning to prison. Ho, Knutson, Lockwood, and Nally (2014) surveyed over six thousand ex-offenders from Indiana and found that 37 percent of violent offenders, 38.2 percent of non-violent offenders, 36.3 percent of sex offenders, and 36.9 percent of drug offenders were never employed in the first year being released from prison. The recidivism rate among the aforementioned categories were substantial as 46.6 percent of the

violent offender group, 48.6 percent of the non-violent offender group, 54.7 percent of the sex offender group, and 45.8 percent of the drug offender group all were re-incarcerated within that same first year their initial release in which they were unemployed (Ho, Knutson, Lockwood, & Nally, 2014).

What is to become of the ex-offenders who are able to secure employment? Ho, Lockwood, and Nally (2011) indicated that ex-offenders even with their challenges in education and job readiness are likely to find employment in temporary help services, manufacturing, retail trades, construction, and food services. The disenfranchisement of ex-offenders could be even more present in these industries as in periods of recession, employment in these industries are especially vulnerable due to the high level of unskilled as well as disenfranchised workforce eligible for these positions (Ho, Lockwood, & Nally, 2011).

Practical Actions and Solutions

Harvard Law School (2010) indicated that the creation of a successful reentry system must be built on three principles. The three principles are first, that all stakeholders should be involved in the process; second, the system should allow for dispute resolution when appropriate; and third, the system should be sustainable through a process of reevaluation and integration of up to date methodology (Harvard Law School , 2010). Hickox and Roehling (2013) indicated that employers who are seeking to mitigate their risk in the use of criminal record information which could result in discrimination cases should undertake a universal methodology in hiring ex-offenders. Disparate treatment claims are common where that was not formal hiring policies in place within an organization (Hickox & Roehling, 2013).

According to Hickox and Roehling (2013), the structured approach on employment practices could begin to level the playing field. Upon the completion of a background check, the organization should focus decision makers on matters that are relevant, be consistent in decisions that are made, and increase accountability (Hickox & Roehling, 2013). The structured approach should have objective criteria which clearly establish the relevance of the employment to the criminal justice history (Hickox & Roehling, 2013). Hickox and Roehling (2013) proposed in their research that employers that have demonstrated disparate impact must produce evidence that the screening of applicants have demonstrated no evidence of discrimination between their offense and their job-related duties. The formulation of a comprehensive job analysis which would lead to an examination of the relationship between the crime committed and the job vacancy (Hickox & Roehling, 2013). The results of the Michigan survey stated that although best practices were utilized; there were employers who still refused to consider hiring ex-offenders (Hickox & Roehling, 2013). The majority of employers who still considered hiring ex-offenders do inquire as to the nature of the crime, the relation between the crime and the job vacancy, as well as the time that has passed since the conviction (Hickox & Roehling, 2013). Martin (2011) stated that since African-Americans are disproportionately disenfranchised by having criminal convictions, a possible solution could be the expungement of criminal records after an ex-offender has been conviction free after a pre-determined amount of time. The strains of get tough on crime policies of the last thirty plus years are being attempted to be countered by ex-offender re-entry programs (Lucken & Lucille, 2008).

In addition to the expungement of records, another successful initiative has been “Ban the Box” legislation. Ban the Box is legislation in which eliminates the conviction question from job applications and restricts a background check from being done until at least the conclusion of the first job interview. The burdens of ex-offender employment challenges were most prevalent in large local communities and cities such as Boston and San Francisco who were the pioneering municipalities in the ban the box efforts (Lucken & Lucille, 2008). Lucken and Lucille (2008) indicated that city employers in Boston and San Francisco could only consider denying employment to an ex-offender upon the completion of the background check only post-consideration of certain factors. The agency would have to document the consideration of the seriousness of the offense, relevance to the position sought, evidence of rehabilitation, and the time since the offense took place (Lucken & Lucille, 2008). Lucken and Lucille (2008) added that in the case of the City of Boston, in the case of rejecting an ex-offender for employment, the city employer must document the specific reasons for the rejection of the otherwise qualified candidate.

The most progressive ban the box legislation is currently enforced in the State of Hawaii. Hawaii’s ban the box law was passed in 1998 which was Hawaii House Bill 3528 (HRS 378-2.5) (D'Alessio, Flexon, & Stolzenberg, 2014). The substance of this bill indicated that all private and public employers in Hawaii are prohibited from conducting background checks on any applicant until after a conditional offer of employment is made (D'Alessio, Flexon, & Stolzenberg, 2014). The conditional offer can only be withdrawn if the criminal offense establishes a rational relationship between the past offense and the duties and responsibilities of the job. D'Alessio, Flexon, and Stolzenberg (2014) further indicated that even in conducting the background check, an employer can only go back as far as ten years into the background of an applicant. The ban

the box legislation in Hawaii has demonstrated that felony offending has been substantially reduced in the state, creating more tax payers and a reduced drain on state resources required by the focus on criminal justice activities (D'Alessio, Flexon, & Stolzenberg, 2014). The model established in Hawaii could go a long way to addressing recidivism rates by enabling a path to sustainable employment for ex-offenders.

The legislative remedies that can be (or potentially) utilized to eliminate the disenfranchisement of ex-offenders as it pertains to employment is ever present and could lead to the complete elimination of this population's disenfranchisement. Blumstein and Nakamura (2009) outlined a number of remedies to this issue, which included that laws are written to protect ex-offenders and employers by background checks that would only go back for a predetermined number of years and an expansion of the work opportunity tax credit. The work opportunity tax credit is a tax credit given to organizations that hire ex-offenders within their first year of being released from prison (Blumstein & Nakamura, 2009). In addition, legislation could be written to expand liability protection statutes for employers to ease their concerns over possible negligent hiring lawsuits (Blumstein & Nakamura, 2009). Opponents of background check limitations could also have their concerns balanced by the issuance of certificates of rehabilitation or relief from disabilities for ex-offenders. Certificates of rehabilitation are designed to remove statutory limitations on eligible ex-offenders such as voting rights, public assistance eligibility, public housing eligibility, and public employment eligibility (Blumstein & Nakamura, 2009).

Moral Claims of Ex-Offenders

Hickox and Roehling (2013) documented that ex-offenders of color have challenged in court, hiring decisions that appear to be based on race which could open the door for claims of disparate treatment. Unfortunately, many disparate treatment claims in court by ex-offenders or ex-offenders of color are dismissed as the court have found the plaintiff did not meet the minimum standard of proof or the court found that the situations between the members of the protected and non-protected class were not similar (Hickox & Roehling, 2013). Despite this challenge, case law has pointed in the direction that disparate impact claims could be successfully made if the employer's decision is based on criminal records which disproportionally affects a protected class (Hickox & Roehling, 2013). The question that burns in the minds of ex-offenders is that they are aware that they have fulfilled their debt to society, however if all doors are closed or severely limited to them upon their return to mainstream society, what is the expectation of them from mainstream society if opportunities are not afforded and doors remain closed from doing better with their lives?

Conclusion

The lessons of correction and rehabilitation are taught to us at a very early age. In the experience of the writer, growing up in a catholic school environment, there were always remedies which addressed unsatisfactory behavior. These remedies could have been detention one day after school or restorative justice measures such as assisting the custodial staff on school grounds or performing community service for the church. Upon the completion of these acts or serving out one's detention, the writer could always return to the classroom with a clean slate and an equal opportunity to be better than one was. The equal opportunity represented a fresh start, the ability to learn from one's mistake, and to be motivated to become a better person than one was before.

The criminal justice system is also designed to correct unsatisfactory behavior by correcting the individual through the correction of the criminal activity. Upon the completion of their debt to society, the individual is simply seeking an improvement in their lives, through the opportunity to do better and be better. This opportunity is the ability to optimize a sustainable living through acceptable employment. Unfortunately, there are so many statutory obstacles and challenges that prevent and in the least discourage individuals from fulfilling that next step. The prevention of taking that next step could cause the individual to believe there is no option but to re-offend which leaves the individual in a bad situation, society's resources are drained due to their deviant activity, and the sustainability of the family and community at large is compromised through the continued disenfranchisement of this individual. The removal of these barriers is not giving anyone a free ride, it is an earned opportunity for someone who has paid their debt to society and the next stage after paying that debt is having the opportunity to be a contributor to the greater good.

References

- Blumstein, A., & Nakamura, K. (2009). Redemption in the Presence of Widespread Criminal Background Checks. *Journal of Criminology* , (47) 327-359.
- Bohlander, G. W., Morris, S. S., & Snell, S. A. (2016). *Managing Human Resources*. Boston: Cengage Learning.
- Cerda, J. A., Curtis, M., & Stenstrom, D. M. (2014). The Role of Type of Offense and Work Qualifications on Perceived Employability of Former Offenders. *American Journal of Criminal Justice* , (40) 317-335.
- D'Alessio, J. S., Flexon, J. L., & Stolzenberg, L. (2014). The Effect of Hawaii's Ban The Box Law on Repeat Offending. *American Journal of Criminal Justice* , (40) 336-352.
- Harvard Law School . (2010). Designing a Prisoner Reentry System Hardwired to Manage Disputes. *Harvard Law Review*, (123) 1339-1360.
- Hickox, S. A., & Roehling, M. V. (2013). Negative Credentials: Fair and Effective Consideration of Criminal Records. *American Business Law Journal*, (50) 201-279.
- Ho, T., Knutson, K., Lockwood, S., & Nally, J. M. (2014). Post-Release Recidivism and Employment among Different Types of Released Offenders: A 5-Year follow-up study in the United States. *International Journal of Criminal Justice Sciences*, (9) 16-34.
- Ho, T., Lockwood, S. R., & Nally, J. M. (2011). Employment of Ex-Offenders During the Recession. *The Journal of Correctional Education* , (62) 47-61.
- Lahr, G., & Schloss, L. M. (2008). Watch Your Back: Smart Hiring and Proper Background Checks . *Employee Relations Law Journal* , (34) 46-71.
- Lucken, K., & Lucille, P. (2008). A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis. *Journal of Law and Policy*, (30) 46-72.
- Martin, L. L. (2011). Debt to Society: Asset Poverty and Prisoner Reentry. *Black Political Economic Review*, (38) 131-143.
- Schmitt, J., & Warner, K. (2011). Ex-Offenders and The Labor Market . *The Journal of Labor and Society*, (14) 87-109.